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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 01 038 53098 Office: VERMONT SERVICE CENTER

Date **AUG 03 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on counsel's motions to reopen and reconsider. The motions will be rejected as untimely filed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a plasterer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on August 7, 2000, and approved by the Department of Labor on September 29, 2000. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition on December 18, 2001. An appeal was filed with the AAO, which issued a decision dismissing the appeal on August 19, 2002. Counsel filed simultaneous motions to reconsider and reopen the decision of the AAO on September 26, 2002.

In order to properly file a motion to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a) provides that the affected party must file the motion within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the AAO issued its decision on August 19, 2002. It is noted that the director properly gave notice to the petitioner that it had 33 days to file a motion. Counsel subsequently submitted simultaneous motions to reconsider and reopen, both of which were received by Citizenship and Immigration Services (CIS) on September 26, 2002, thirty-seven days after the decision was issued.¹ Accordingly, the motions were untimely filed. We note that the regulations provide that a failure to file a timely motion may be excused in the discretion of CIS where it is shown that the delay was reasonable and beyond the control of the applicant or petitioner. 8 C.F. R. § 103.5(a). In this case, counsel has not requested that CIS accept the untimely motions and has not cited any circumstances that led to the untimely filing.

As the motions were untimely filed, they must be rejected.

ORDER: The motions are rejected.

¹ A review of the calendar for 2002 reflects that the thirty-third day after the issuance of the AAO's decision fell on Saturday, September 21, 2002. Under the regulation at 8 C.F.R. § 1.1(h), because the last day of the period fell on Saturday, the appeal became due on the following business day, or Monday, September 23, 2002.